

Issue: Group II Written Notice with suspension (failure to follow policy); Hearing Date: 10/31/07; Decision Issued: 11/05/07; Agency: VSP; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8727; Outcome: No Relief, Agency Upheld in Full. **Judicial Review: Appealed to the Circuit Court in Henrico County on 11/14/07; Outcome: AHO's decision affirmed [CL07-2999] issued 12/19/07.**

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8727

Hearing Date: October 31, 2007
Decision Issued: November 5, 2007

PROCEDURAL HISTORY

On August 22, 2007, Grievant, a state police trooper, was issued a Group II Written Notice of disciplinary action with two days suspension based on an offense date of May 22, 2007, rude and discourteous behavior to a citizen. Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 16, 2007, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution. On October 31, 2007, a hearing was held at the Agency's headquarters.

Both sides submitted exhibit notebooks with numbered exhibits that were, without objection from either side, admitted into the grievance record and will be referred to as Agency's or Grievant's Exhibits, numbered respectively, as necessary to explain this decision.

APPEARANCES

Grievant
Counsel for Grievant
Advocate for Agency
Representative for Agency
Four witnesses for Agency (including Agency Representative)

ISSUES

Whether Grievant should receive a Group II Written Notice of disciplinary action with two days suspension.

The Grievant requests rescission of the Written Notice or, alternatively, a reduction in the level of discipline.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Virginia Department of State Police has adopted these policies through General Order No. 19, Separation From The Service And Disciplinary Measures. Agency Exhibit No. 2; Grievant Exhibit No. 2. Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order 19(12)(a). Group II offenses "include acts and behavior which are more severe in

nature and are such that an additional Group II offense should normally warrant removal.” General Order 19(13)(a). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order 19(14)(a).

Section 12 of General Order No. 19 defines abusive language and disruptive behavior as Group I type offenses. Section 13 of General Order No. 19 defines failure to follow a supervisor’s instructions as a Group II type offense.

The Written Notice described the nature of the offense as follows:

You violated General Order 19, paragraph 3, when you were rude and discourteous to a citizen even after receiving a previous Group I Written Notice and counseling for the same offense. In the future you will abide my instructions and comply with General Order 19, paragraph 3, and you will be courteous, patient and respectful when dealing with the public at all times.

Agency Exhibit No. 3, Grievant Exhibit No. 1. The reference to General Order 19 in the Written Notice is incorrect, and should correctly be General Order 17, paragraph 11. That order reads:

Employees will at all times be courteous, patient, and respectful in dealing with the public, and by an impartial discharge of their official duties earnestly strive to win the approval of all law-abiding citizens.

The offense occurred when an investigator for an attorney’s office attempted to obtain information regarding a vehicle crash from the Grievant, the investigating state police trooper. The Grievant contends that the private investigator spoke to him in a confrontational, insulting manner. The Grievant concedes that because he did not appreciate the words or tone used by the private investigator, he told the private investigator not to contact him again on any cases involving the Grievant. The Grievant also concedes that an investigating trooper’s notes and witness statements may only be obtained through direct contact with the investigating trooper. (There are other channels for obtaining the formal police report.)

The Agency’s witnesses¹ testified that the Grievant’s actions show a lack of respect for the private investigator/citizen. Further, the Agency has shown that the Grievant had previous disciplinary occurrences for rude and discourteous behavior in 2006 and 2007, resulting in a written counseling and an active Group I Written Notice. The Grievant was provided specialized instruction in “Verbal Judo” training in April 2007, just a month before this offense. Agency Exhibit No. 6.

During the disciplinary process, the Grievant was not provided a written copy of the investigation record, but he was provided opportunity to review the investigation material. Agency Exhibit No. 1. The Grievant was well aware of the incident giving rise to the discipline, and the investigation material and record was specific to the Written Notice.

¹ Witnesses included a Sergeant, First Sergeant, and two Captains.

The Grievant contends that he did not intend to be rude or discourteous to the private citizen, and that his response to the citizen was neither rude nor discourteous. Further, the Grievant contends that the Written Notice is invalid on its face because it fails to notify him properly of the basis for the discipline.

The Grievance record contains multiple commendations to the Grievant for meritorious service in various capacities. Grievant Exhibit No. 3.

Due Process

Procedural Due Process is inextricably intertwined with the grievance procedure. The *Rules for Conducting Grievance Hearings* state:

In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the *Rules* cite *O'Keefe v. USPS*, 318 F.3d 1310 (Fed. Cir. 2002). In *O'Keefe*, the agency removed an employee with the general charge of "improper conduct/fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

Agencies are expected to issue Written Notices that properly place employees on notice of the supporting facts and reasons for the agency's disciplinary actions. To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. It is incumbent on the agency to specify the employee's conduct or actions that are being disciplined. Whether an agency has met this standard is often a matter of degree.

If the standard set forth in *O'Keefe* is to be applied meaningfully, careful review of the Written Notice is necessary when compared to the facts shown. Here, the Written Notice incorrectly identifies the General Order that was violated. However, the Written Notice goes on to detail the offense with words that leave no doubt that the offense is grounded in General Order 17, paragraph 11. Further, the Written Notice specifically addresses the issue of following supervisor's instructions. General Order 19, paragraph 13, makes failure to follow supervisor's instructions and failure to comply with applicable established written policy a specific Group II offense.

Based on the aforementioned, the Hearing Officer finds that the agency adequately informed Grievant of the allegation that he was rude and discourteous to a citizen and, by doing so, disregarded specific, prior supervisor's instructions on the same concern (documented by the prior written counseling, the prior Group I Written Notice, and the "Verbal Judo" training).

Merits of Offense

The material facts are not disputed. While the Grievant contends that the citizen addressed him improperly, the applicable General Order does not allow a trooper to differentiate his professional conduct based on his subjective determination of a citizen's worthiness. He is expected to, at all times, be courteous, patient, and respectful in dealing with the public, and by an impartial discharge of their official duties earnestly strive to win the approval of all law-abiding citizens. General Order 17, Paragraph 11. There is no discretion for a state trooper to deny any law-abiding citizen the same professionalism he is expected to honor for everyone. While it might be debatable whether the citizen acted or spoke to the Grievant politely,² it matters not. The Grievant's response was not a "heat of the moment" exchange, but, rather, a conscious, deliberate response to the citizen never to contact him with a professional need.

General Order 17, General Rules of Conduct, Paragraph 1, clearly states that the Agency expects unusually high standards of honesty, integrity, impartiality, and conduct by employees, as essential to assure the proper performance of departmental business and the maintenance of confidence by citizens of the Commonwealth. Because the Agency has shown that the Grievant deliberately singled out the complaining citizen for different, lesser professional treatment, the Grievant has breached applicable Agency standards and supervisory instruction. Thus, the Grievant is culpable of the offense charged.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice with up to 10 days suspension without pay. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance.

The Grievant submits that mitigating factors of otherwise commendable performance and his tenure of good standing should mitigate the discipline to a less severe level.

The Agency witnesses, particularly the Captain who issued the Written Notice, testified that he carefully weighed mitigating circumstances of otherwise commendable service with the Grievant's prior, active disciplinary record. Because the prior, active disciplinary record

² According to the Grievant, the offending citizen said to the Grievant that he could obtain the requested information about a crash investigation the easy way or the hard way. The Grievant considered that threatening. This hearing officer's opinion is that the private investigator/citizen's comments to the Grievant, as described by the Grievant, are not particularly provocative, especially given the inherent nature of a state trooper's job duties.

involved the same type of offenses and supervisory corrective instruction, he settled on the Group II with two days suspension.³

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.” Va. Code § 2.2-3005(C)(6). EDR’s Hearing Rules provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are “mitigating circumstances,” such as “conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or ... an employee’s long service, or otherwise satisfactory work performance.” A hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness.

Hearing Rules § VI.B.1 (alteration in original). Therefore, if the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Hearing Rules § VI.B.⁴

In this case, the first two elements have been met. Regarding the third, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness. Under the EDR’s Hearing Rules, the hearing officer is not a “super-personnel officer.” Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency’s action in assessing a Group II offense and two days suspension is within the bounds of specific policy.

DECISION

For the reasons stated herein, I uphold the Group II Written Notice and the two days suspension.

³ The Captain also stated that during the grievance process, he offered the Grievant a compromise to eliminate the suspension days, which offer the Grievant declined. This offer of compromise does not carry any significance to the issue of reasonableness.

⁴ Cf. Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board “will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only ‘assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.’”

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal

with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer